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In the Supreme Court of the United States

October Term, 1952.

No. 539

HARRY BYERS AND BYERS TRANSPORTATION COMPANY, INC.,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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INDEX.

	PAGE
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	3
Specification of errors to be urged	4
Reasons for granting the writ	4
Conclusion	4
Appendix	5

Cases Cited.

Culbertson v. Commissioner, 337 U. S. 733	4
Helvering v. Horst, 311 U. S. 112	4

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COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Counsel for the petitioners, Harry Byers and Byers Transportation Company, Inc., pray that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Eighth Circuit entered in this case.

OPINIONS BELOW.

The material portions of the facts and the conclusions of law (R. 35-39) of the Tax Court of the United States are reported in a Memorandum Opinion at 10 T. C. M. 200, and the opinion of the United States Circuit Court

of Appeals for the Eighth Circuit (R. 83-89) is not yet reported.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on October 29, 1952 (R. 89-90), and an order granting a stay of the issuance of the mandate until January 10, 1953, was entered in the United States Circuit Court of Appeals for the Eighth Circuit on December 30, 1952.

QUESTIONS PRESENTED.

Whether the income of a partnership known as the P & C Company was income to the Byers Transportation Company, Inc., and, secondly, whether such income was a distribution substantially equivalent to a dividend to Harry Byers, a stockholder in the Byers Transportation Company, Inc.

STATUTE INVOLVED.

The pertinent statutory provision, Section 22(a) of the Internal Revenue Code is set forth in the Appendix, *infra*.

STATEMENT.

This petition relates to the Federal income tax liabilities of Harry Byers, individual, for the calendar years 1943 to 1946, inclusive, and for the Byers Transportation Company, Inc., a corporation, for the calendar years 1942 to 1946, inclusive.

This petition is based upon the petitioners' claim of improper treatment for income tax purposes by the Commissioner of Internal Revenue of the net profits of the P & C Company, a partnership. It was held that the net income to the partnership was income to the petitioner, Byers Transportation Company, Inc., and that such income was also taxable income to the petitioner, Harry Byers.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit affirmed a decision of the Tax Court of the United States, asserting the affirmative of both propositions.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

1. In holding that the income of the P & C Company was income to the Byers Transportation Company, Inc.

2. That such income was also taxable income to Harry Byers, individual.

3. In affirming the judgment of the Tax Court of the United States.

4. In failing, in any event, to reverse the judgment of the Tax Court of the United States, insofar as it related to the petitioner, Harry Byers.

REASONS FOR GRANTING THE WRIT.

The court erroneously applied the principles enunciated in *Helvering* v. *Horst,* 311 U. S. 112, which said principles have absolutely no bearing on the issues before that court and, secondly, the opinion is in conflict with the opinion of this Court in the case of *Culbertson* v. *Commissioner,* 337 U. S. 733. A writ of certiorari should be granted in the instant case.

CONCLUSION.

The petition should be granted.

Respectfully submitted,

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APPENDIX.

SECTION 22. GROSS INCOME.

"(a) General Definition.—'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property, also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *"

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No. 539.

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vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITIONERS' BRIEF.

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In the Supreme Court of the United States

October Term, 1952.

No. 539.

HARRY BYERS AND BYERS TRANSPORTATION COMPANY, INC., *Petitioners,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITIONERS' BRIEF.

JURISDICTION.

The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. 1254 (1).

STATEMENT.

The petition in this case relates to the Federal income tax liabilities of Harry Byers, individual, for the calendar years 1943 to 1946, inclusive, and for the Byers Transportation Company, Inc., a corporation, for the calendar years 1942 to 1946, inclusive.

The Commissioner of Internal Revenue held, and was affirmed in this by the Tax Court of the United States and the United States Circuit Court of Appeals for the Eighth Circuit, that the net profits of the P & C Company, a partnership, were income to the Byers Transportation Company, Inc., and that such income was also taxable to the petitioner Harry Byers to the extent of his holdings of certificates of stock in the corporation.

Questions Presented.

Whether the income of the partnership known as the P & C Company was income to the Byers Transportation Company, Inc., and secondly, whether such income was a distribution substantially equivalent to a dividend to Harry Byers, a stockholder in the Byers Transportation Company, Inc.

ARGUMENT.

There are two substantial reasons why this Court should take jurisdiction and grant the petitioners' request for a writ of certiorari.

In the first case, the principles of *Helvering* v. *Horst*, 311 U. S. 112, upon which the Circuit Court of Appeals for the Eighth Circuit strongly relied, have no application to the facts in this case. Furthermore, the decision is in direct conflict with *Culbertson* v. *Commissioner*, 337 U. S. 733.

In addition thereto, the decision is in direct conflict with the decision of *John L. Denning and Company* v. *Commissioner of Internal Revenue*, 180 F. 2d 288 (C. C. A. 10), where it was held that a partnership consisting of the wife, son and daughter of the taxpayer's controlling stockholder (exactly the same situation in the instant case), doing substantially the same type of business as the taxpayer, was nevertheless valid for tax purposes and that partnership income was not taxable to the taxpayer corporation.

The decision is also directly in conflict with *Ginsburg* v. *Arnold*, 185 F. 2d 913 (C. C. A. 5), where it was held that it was not controlling whether or not taxpayer's children contributed anything in the way of services insofar as the creation of a partnership for tax purposes is concerned.

It is respectfully submitted that a writ of certiorari should be granted.

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	8
Conclusion	12

CITATIONS

CASES:

Commissioner v. *Culbertson*, 337 U. S. 733	10
Denning, John L., & Co. v. *Commissioner*, 180 F. 2d 288	11
Ginsberg v. *Arnold*, 185 F. 2d 913	10
Gregory v. *Helvering*, 293 U. S. 465	9
Helvering v. *Clifford*, 309 U. S. 331	10
Helvering v. *Horst*, 311 U. S. 112	10, 11
Higgins v. *Smith*, 308 U. S. 473	9

STATUTES:

Internal Revenue Code:

Sec. 22 (26 U.S.C. 1946 ed., Sec. 22)	2

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 539

HARRY BYERS and BYERS TRANSPORTATION COMPANY, INC., *Petitioners*

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 31-39) are unreported. The opinion of the Court of Appeals (R. 84-89) is reported at 199 F. 2d 273.

JURISDICTION

The judgment of the Court of Appeals was entered October 29, 1952. (R. 90.) A petition for rehearing was denied November 19, 1952. (R. 97.) The petition for a writ of certiorari was filed on January 9, 1953. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether the Tax Court erred in its determinations, affirmed by the Court of Appeals, (1) that profits from the alleged sales of gasoline by a partnership to the petitioner corporation were income taxable to the latter under Section 22 of the Internal Revenue Code, and (2) that amounts withdrawn by the partners from the partnership constituted profits to the corporation and should be treated as dividends taxable to petitioner Byers in proportion to his stock ownership in the corporation.

STATUTE INVOLVED

Internal Revenue Code:

> SEC. 22. GROSS INCOME.
>
> (a) [As amended by Sec. 1 of the Public Salary Tax Act of 1939, c. 59, 53 Stat. 574] *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, divi-

dends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

(26 U.S.C. 1946 ed., Sec. 22.)

STATEMENT

The material facts as found by the Tax Court (R. 31-35) are as follows:

The Byers Transportation Company, a Missouri corporation, was organized in 1934 and during the period here involved engaged in the general transportation business, hauling commodities by truck lines. (R. 31-32.) During the period from 1942 through 1946, all of the stock of the corporation was owned by the immediate members of the Byers family and a nephew, Simon Rubin, in the following percentages (R. 32):

	1-1-42 to 12-23-44	12-23-44 to 9-10-45	9-10-45 to 12-31-45
Harry Byers	80	70	60
Esther Byers	10	10	10
Simon Rubin	10	10	10
Constance Byers	..	10	10
Paul Byers	..	..	10

Paul and Constance Byers (who were the children of Harry and Esther Byers) received their stock in the corporation by gift from their father. Harry Byers has been president of and in com-

plete control of the corporation at all times since its organization. He devotes his full time to it and receives substantially all of his income from it in salary, dividends, and rents. (R. 32.)

Gasoline was a large expense item in the operation of the corporation. Prior to September, 1941, most of the gasoline was purchased from the Bailey Oil Company at wholesale and was delivered to the corporation's own storage tank and pump at its terminal in Kansas City. Some gasoline was purchased from other dealers in and out of Kansas City when need for it arose. (R. 32.)

In 1941 Harry Byers put into effect a plan, which he had previously conceived, of having Paul and Constance form a partnership to sell gasoline and automotive parts. Constance was then 18 years of age and a student at the University of Michigan. Paul was then 16. He had just graduated from high school and was planning to enter the University of Missouri. (R. 32-33.)

An agreement of partnership between Paul and Constance was executed as of September 1, 1941, reciting that the parties had each contributed the sum of $500 toward the capital of the business. Beginning on that date, the partnership under the name of P & C Company purchased gasoline at wholesale from the Bailey Oil Company (later the Hi Lewis Oil Company) and resold it to the corporation at a mark-up of two cents a gallon above the wholesale price. From September, 1941, until

April, 1943, the P & C Company had no location separate from that of the corporation. The gasoline purchased by the P & C Company and resold to the corporation was delivered directly to the corporation's storage tank at its terminal, where it was pumped into the corporation's vehicles by its own employees. During this period both Paul and Constance were attending college away from Kansas City. The P & C Company had no customers other than the corporation and had no full-time employees of its own. Its books were kept by the office manager and bookkeeper of the corporation in his spare time. (R. 33.)

A gasoline filling station was leased for the P & C Company in April, 1943, at some distance from the corporation's terminal and George Morrison was employed to operate it. Morrison received all profits from the sale of the automotive supplies through the filling station but all proceeds on gasoline sales were deposited by Morrison to the credit of the P & C Company in the Baltimore Bank of Kansas City. During the period from 1943 to 1946 some gasoline was sold to other customers, but most of the sales were to the corporation. Some of the gasoline sold to the corporation was delivered directly to the corporation's terminal storage tank and pump, but after April, 1943, most of it was sold to the corporation at the partnership's filling station. (R. 33-34.) The P & C

Company's gasoline sales during the entire period here involved were as follows (R. 34):

Sales	1942	1943	1944	1945	1946
Byers Transportation Co., Inc.	$36,714.92	$58,572.62	$72,807.88	$69,970.85	$78,844.30
Others	——	9,787.57	19,009.59	20,814.22	14,699.81
	$36,714.92	$68,360.19	$91,817.47	$90,785.07	$93,544.11

Constance Byers wrote the checks for the P & C Company and also signed other documents for it when they were sent to her at Ann Arbor, Michigan, where she was attending college, but otherwise had little to do with the operation of the business until she returned to Kansas City in 1943. After that time she supervised the bookkeeping for the business and did some of it herself. She was also employed full time by Katz Drug Company during a portion or all of 1944 and 1945. Paul Byers was away at school or in military service during the entire period from 1942 through 1947. Each partner had a capital account on the partnership books, showing the share of undrawn profits. Withdrawals by the partners from partnership funds during the years 1942 through 1946 were as follows (R. 34):

Year	Constance Byers	Paul Byers
1942	$1,200.00	$1,500.00
1943	3,805.77	2,007.59
1944	3,499.65	4,394.90
1945	4,520.15	1,794.90
1946	2,493.20	6,105.08

No part of the funds of the P & C Company was used to defray the personal expenses of the partners or was used in the support of the Byers family. Harry Byers had no authority to write checks on the partnership checking accounts after 1943, and did not do so. He continued to support his family, as he had in the past, including Paul and Constance. (R. 35.)

The Tax Court held that profits realized by the P & C Company in the taxable years from the sales of gasoline to the corporation should be treated as earnings of the corporation but that profits from sales to the public were not taxable either to the corporation or to Harry Byers. The Tax Court held further that, to the extent that partnership earnings attributable to the corporation had been withdrawn by Constance and Paul, such amounts should be treated as distributions from the corporation to its stockholders, and that Harry Byers was taxable on such amounts in proportion to his stock ownership in the various taxable years. (R. 37-39.)

Accordingly the Tax Court found that there were deficiencies in the income tax of Harry Byers in the amounts of $3,027.43, $6,869.66, $3,035.93 and $4,139.72 for the years 1943, 1944, 1945 and 1946, respectively (R. 40); and as to the corporation it found that there were deficiencies in income tax in the amounts of $2,290.99,

$3,087.46, $4,749.32, $2,238.46 and $6,795.10 for the years 1942, 1943, 1944, 1945 and 1946, respectively (R. 40-41).

The decisions of the Tax Court were affirmed by the Court of Appeals. (R. 89.)

ARGUMENT

1. The court below correctly held that the profits attributable to the alleged sales of gasoline by the partnership to the corporation, which is one of the petitioners here, were corporate earnings gratuitously syphoned off to the two partners, who are children of Harry Byers, the corporation's principal stockholder, and that the amount of such profits should be included in the corporation's taxable income.

The partnership was conceived by Byers for his then teen-age children and its organization was carried out according to his plan. Thereafter Byers was not only in a position to dictate the policies of the partnership but, as president, manager and major stockholder, he also controlled the corporation's business. Thus it was Byers who decided that the corporation would buy its gasoline from his children's partnership and would pay two cents more per gallon than was then being charged by the company which had been supplying the gasoline and which continued to supply it although the sales were entered on the books as being made by the partnership.

For more than one year after the partnership was created, it had no customers except the corporation, and in later years most of its sales were still to the corporation. Part of the time, deliveries were made by the company supplying the gasoline direct to the corporation's tanks, and at all times, if the corporation had wished to do so, it could have purchased its gasoline direct from that company and at two cents less per gallon than it was paying the partnership. Moreover, it has not been shown that the partnership rendered any service which would warrant the payment of the larger price.

The Tax Court properly held (R. 37) that the alleged sales made by the partnership were fictitious and should have no effect on the corporation's true income. Accordingly, the profits on the alleged sales could not be included as a part of the cost of the gasoline purchased by the corporation but are taxable to the corporation under the broad provisions of Section 22 of the Internal Revenue Code, *supra*, pp. 2-3.

Such a conclusion is in accord with established principles of tax law. Tax matters are governed by actualities and not by fictitious transactions. *Gregory* v. *Helvering*, 293 U. S. 465, 470; *Higgins* v. *Smith*, 308 U. S. 473, 477. It is the command over income and its benefits which determine who is the real owner for income tax purposes. Thus income may be taxed to those who have the power

to dispose of it as well as to those who earn it or otherwise create the right to receive and enjoy it. *Helvering* v. *Horst,* 311 U. S. 112, 119; *Helvering* v. *Clifford,* 309 U. S. 331. In view of the facts found, we submit that no error was committed here by requiring the corporation to pay tax on the profits attributed to the alleged sales.

2. The court below also decided that Harry Byers, the other petitioner here, is taxable, in proportion to his stockholdings in the corporation, on partnership earnings which are attributable to the corporation because of the alleged sales and which were withdrawn by Byers' two children as partners. It correctly held that such withdrawals are equivalent to dividend distributions of income to which Byers had an accrued current right and which he might have received if the excessive price had not been paid to the partnership for gasoline. The facts show that Byers was in control and that he effected a plan by which corporate earnings were gratuitously paid over to the partnership. Thus he disposed of his right to receive such income and made it possible for it to be paid to his children. This constituted a realization of income for income tax purposes. *Helvering* v. *Horst, supra.*

The decision here is not in conflict with *Commissioner* v. *Culbertson,* 337 U. S. 733, and *Ginsburg* v. *Arnold,* 185 F. 2d 913 (C.A. 5th), which considered only whether the family partnerships

involved there were valid for tax purposes. But to determine the issues here it is immaterial whether the partnership was valid. Even if it was, the principle of *Helvering* v. *Horst,* 311 U.S. 112, is applicable and requires the income to be taxed to the corporation and to Harry Byers, as held by the courts below.

This case is also distinguishable from *John L. Denning & Co.* v. *Commissioner,* 180 F. 2d 288 (C.A. 10th), in which it was held that the separate entity of the corporation and partnership involved there could not be disregarded. In that case the partnership was composed of members of the family of the corporation's principal stockholder and both were engaged in selling broom corn. But neither sold to the other and the business of each was carried on separately, although there was a close relationship. The *Denning* case is thus plainly distinguishable on its facts.

CONCLUSION

The decision of the court below is correct; there is no conflict of decisions; and no question of general importance is involved. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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FEBRUARY, 1953.

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